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No. 07-331

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IN THE

Supreme Court of the United States

SUN LIFE ASSURANCE COMPANY OF CANADA,

Petitioner,

v.

MARGARET T. WHITE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Every Circuit Court of Appeals to have considered whether the Employee Retirement Income Security Act of 1974 ("**ERISA**") permits an employee benefit plan to start the statute of limitations running on an ERISA cause of action *before the plan participant can even file suit* has rejected that rule in favor of the federal accrual rule that starts the limitations period precisely when the plaintiff may first assert the cause of action. Did the Fourth Circuit properly find that Respondent Margaret White's ERISA claim accrued no earlier than when she could first file suit under ERISA?

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INTRODUCTION

Contrary to Petitioner Sun Life Assurance Company of Canada's contention, *every* Circuit to have considered whether the Employee Retirement Income Security Act of 1974 ("**ERISA**") permits an employee benefit plan to start the statute of limitations running on an ERISA cause of action *before the plan participant can even file suit* has rejected that problematic position in favor of the standard federal accrual rule that starts the limitations period precisely when the plaintiff may first assert the cause of action. In fact, when Sun Life cited to the courts below many of the same cases it now invokes as "conflicting" authority, the lower courts correctly rejected those cases as *irrelevant* to the issue presented here. As Judge Wilkinson explained for the Fourth Circuit, Sun Life's cases "focus[ed]" on "limitations periods, not accrual dates" and thus did "not bear directly upon this case." (Pet. App. 20 & n.3.) The district court likewise correctly observed that "[i]n each of [Sun Life's] cases, the issue of whether the parties may contractually set an accrual date other than the date benefits were formally denied was *not* before the court." (Pet. App. 53) (emphasis added).

As for Supreme Court authority, *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586, 608 (1947), also did not consider the *accrual* date for a statute of limitations, but rather addressed the issue of *length*. Moreover, Sun Life overlooks this Court's more recent authority where it has explained that a rule that allows "the limitations period [to] commence[] at a time when the [plaintiff] could not yet file suit . . . is inconsistent with basic limitations principles," and thus should be rejected. *Bay Area*

Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp., 522 U.S. 192, 200 (1997). Specifically, "*[u]nless Congress has told us otherwise in the legislation at issue*, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Id.* at 201 (emphasis added); *see also Reiter v. Cooper*, 507 U.S. 258, 267 (1993) ("While it is *theoretically possible* for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, *we will not infer such an odd result* in the absence of any such indication in the statute.") (emphasis added). Because Congress did not intend such an "odd result" in the ERISA context, the Fourth Circuit correctly rejected Sun Life's "inconsistent" rule.

Sun Life's argument that the Fourth Circuit's decision creates an "intolerable burden" for plan administrators defies common sense and finds no support in the record. The standard federal accrual rule adopted by the Fourth Circuit brings uniformity, predictability, and consistency to ERISA actions, thereby furthering ERISA's primary purpose: "to provide a *uniform* regulatory regime over employee benefit plans," *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (quoting 29 U.S.C. § 1001(b)) (emphasis added). (*See also* Pet. App. 10) (Fourth Circuit explaining that treating "the time at which the statute begins to run as governed by a uniform federal rule," eliminates the burdens caused by an unpredictable rule that undermines judicial uniformity and predictability). In fact, the Ninth Circuit adopted this same rule fourteen years ago, *Price v. Provident Life & Accident Insurance Co.*, 2

F.3d 986, 988 (9th Cir. 1993), and there is nothing in this record to suggest that plan administrators in the nine states of that circuit have had any difficulty whatsoever with a rule that *uniformly* triggers the statute of limitations precisely "at the moment when the plaintiff may seek judicial review," (Pet. App. 11).

Sun Life's final argument – that this case "provides the ideal vehicle" for review – does more than invoke a non-existent circuit split; it also ignores various other obstacles to review, including that (1) Ms. White's policy does not even include the key contract terms required by state law, and (2) Sun Life rests its case on a misconstruction of the very provisions in Ms. White's Policy that Sun Life alleges set the accrual date.

STATEMENT OF THE CASE

I. Ms. White's Disability

The pertinent facts are set forth fully in the Opinion at Pet. App. 3-10. Briefly, in the late 1990s, Ms. White began suffering from piriformis syndrome, a rare and painful neuromuscular disorder involving the sciatic nerve – the largest nerve in the body. After more conservative treatments failed, she ultimately consulted with a nationally recognized peripheral nerve specialist who performed surgery to treat her disabling condition. The surgeon discovered that she suffered from an unusual deformity, and informed her that her case was one of the worst he had ever seen. She never recovered. (*See* Pet. App. 4-8.)

II. Sun Life's Wrongful Denial of Ms. White's Disability Claim

Fortunately, Ms. White's employer had provided her disability coverage under a policy (the "**Policy**") issued by Sun Life that insured her against the risk of being unable to perform her "own occupation" due to injury or sickness. (Pet. App. 4.) Ms. White filed a claim for monthly disability benefits under the Sun Life Policy in May 2000, noting that her disability began in February 2000. (Pet App. 8.) Although internally its claims consultant concluded that "liability should be accepted," Sun Life denied Ms. White's claim on August 15, 2000, without consulting *any* of Ms. White's treating physicians or having her examined by any other physician. (*Id.*) It has now been established (and Petitioner no longer contests) that Sun Life *should have* accepted the claim at the outset and timely paid benefits.

Under settled federal law governing ERISA plans, a plan participant may not seek judicial relief for an improper claim denial until the plan participant exhausts ERISA's mandatory administrative review process, and the plan administrator makes its final denial of the claim. (*See* Pet. App. 11) (citing cases). Ms. White accordingly began her legal challenge to Sun Life's initial denial by timely filing an appeal with the plan administrator in October 2000. (Pet. App. 9.) Sun Life made its final denial of Ms. White's claim on March 28, 2001, at which time her right to file suit accrued. (*See id.* at 9, 11.)

Both North Carolina and the Policy provide a three-year limitations period. Consequently, under

federal law Ms. White had until March 28, 2004 to file a complaint in district court. (*See* Pet. App. 56.) With respect to contract deadlines, the Policy provides that no "legal action may start . . . more than 3 years after the time [proof of loss] is required." (*See* Pet. App. 3.) As for the when proof of loss "is *required*," North Carolina law requires insurers to *delay* the "required" proof of loss deadline in policies *like the disability policy here* that require "periodic payment[s]" until after "the period for which the insurer is liable" expires (*i.e.*, after the disability has ended). N.C. Gen. Stat. § 58-51-15(a)(7); (Pet. App. 85.)

Although Ms. White could have filed (and did file) her proof of loss sooner, because she suffered an *ongoing disability*, the time when written proof of loss "is *required*" to be furnished had not yet expired when Sun Life made its final denial. Thus, under the Policy's terms, she had *at least* three years after Sun Life's denial to sue in district court.

III. Proceedings Below

Ms. White filed her Complaint on March 26, 2004 – before the expiration of the three-year period following Sun Life's final denial. Sun Life defended the action by arguing that it had properly denied the claim, and that in any event Ms. White had waited too long to file her lawsuit. Although Ms. White's counsel and Sun Life had exchanged written correspondence throughout the claims process, Sun Life for the first time asserted that Ms. White's Policy actually started the three-year limitations period running well *before* it had even denied her claim. Sun Life did not allege that Ms. White's failure to comply with Sun Life's unusual

interpretation of the Policy caused it to suffer any prejudice, but it nevertheless maintained that because Ms. White missed Sun Life's (incorrect) Policy deadline, it could escape all liability for the benefits it owed.

The district court determined that Sun Life had abused its discretion by denying Ms. White's ongoing disability claim, and that Ms. White timely initiated the action. (Pet. App. 48-57.) On the timeliness issue, the district court explained that the *length* of a limitations period is one thing, while its *accrual* date is quite another: Although "a provision in an ERISA policy setting a statute of limitations *period* is enforceable, as long as it is reasonable . . . the *accrual date* of the limitations period is generally determined with regard to federal law." (Pet. App. 51) (emphasis added). Moreover, under federal law, "[a]n ERISA cause of action does not accrue until a claim for benefits has been made and formally denied." (*Id.*)

With respect to the authority relied upon by Sun Life, the district court explained the cases were not even relevant, let alone conflicting, because "[i]n each of [Sun Life's] cases, the issue of whether the parties may contractually set an accrual date other than the date benefits were formally denied was not before the court." (Pet. App. 53.) Having determined that the federal accrual rule applied, the district court did not reach various other grounds for rejecting Sun Life's timeliness argument.

On appeal to the Fourth Circuit, Sun Life advanced the same arguments it had made to the district court, and likewise urged the Fourth Circuit to adopt a rule that would "start the statute of

limitations running on a plan participant's cause of action for benefits under . . . [ERISA] before the plan participant can even file suit." (Pet. App. 3.) In a sound and thorough opinion, Judge Wilkinson agreed that the Policy obligated Sun Life to pay Ms. White benefits, and that Ms. White timely filed her claim. Judge Wilkinson explained that although federal courts will generally look to state law or the parties' contract to determine the *length* of a limitations period in an ERISA action, federal courts "treat the time at which the statute begins to run as governed by a *uniform* federal rule . . . ." (Pet. App. 10) (emphasis added). Judge Wilkinson further detailed the rationale for this uniform federal rule, and the numerous problems that Sun Life's standardless rule would create. Lastly, and of significance to the Petition, Judge Wilkinson likewise noted that Sun Life's cases were *irrelevant* to the issue before the court because they "focus[ed]" on "limitations periods, not accrual dates" and thus did "not bear directly upon this case." (Pet. App. 20 & n.3.) The Fourth Circuit likewise did not reach the various alternative grounds advanced by Ms. White for why she timely filed her claim, and Judge Wilkins dissented. (Pet. App. 33.)

After the Fourth Circuit affirmed, Sun Life filed a petition for rehearing *en banc*. At that time, Sun Life abandoned defending its own breach of the Policy, but continued to press its claim that Ms. White had breached the Policy's "Legal Actions" clause. Sun Life argued that the Panel's decision conflicted with prior Fourth Circuit authority, as well as decisions from the Fifth, Sixth, Seventh, and Tenth Circuits. For the first time in this case, Sun Life further argued that forty-eight other states also

required policy language that triggered the limitations accrual period in an ERISA case before any lawsuit could be filed. However, because Sun Life did not develop this argument below (and because Ms. White could no longer conduct discovery when Sun Life first raised it), there is nothing in the record concerning whether ERISA plan administrators in other states (let alone in North Carolina) *actually* administer claims in the unusual manner suggested by Sun Life. After further briefing, "no member" of the Fourth Circuit, not even the dissenter, "requested a poll on the petition for rehearing en banc." (Pet. App. 78.)

REASONS FOR DENYING THE PETITION

The decision below does not conflict with any Court of Appeals or Supreme Court decision. Nor has Sun Life met its burden of demonstrating some other "compelling reason[]" for granting the Petition. Sup. Ct. R. 10 (2007).

I. The Fourth Circuit Opinion Follows *Every* Other Court of Appeals Decision to Have Considered the Accrual Issue Raised in the Petition

A. Federal Courts Uniformly Agree That Federal Law Governs When Federal Causes of Action Accrue, and They Have Consistently Applied a Federal Accrual Rule to ERISA Claims

It is axiomatic that federal courts apply *federal law* to determine the scope and nature of *federal* causes of action, including when such actions accrue. *See, e.g., Rotella v. Wood*, 528 U.S. 549, 555 (2000) (considering when a federal cause of action

accrues and noting the generally applicable federal rule); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997) (construing a federal statute and noting "the standard" accrual rule applicable to federal causes of action); *Rawlings v. Ray*, 312 U.S. 96, 98 (1941) (analyzing when a statute of limitations accrued as a matter of federal law). Additionally, in light of the inextricable link between the accrual of an action and the accrual of limitations periods under federal law, "[a]ll statutes of limitation begin to run when the right of action is complete . . . ." *Clark v. Iowa City*, 87 U.S. 583, 589 (1874); *Rawlings*, 312 U.S. at 97-98 (although a court could apply a "state statute of limitations" to a federal action, "[t]he question as to the time when there was a complete and present cause of action" for determining when the cause of action accrued under the limitations period "is a federal question . . . .").

This is no mere "default" rule. "Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry*, 522 U.S. at 201; *see also Reiter v. Cooper*, 507 U.S. 258, 267 (1993) ("we will not infer such an odd result" of a federal cause of action accruing for statute of limitations purposes at a time other than when suit may first be brought "in the absence of any such indication in the statute").

Federal law, however, treats the *length* of a statute of limitations period differently. Whereas federal law governs the accrual date, courts generally "apply the most closely analogous statute of limitations [period] under state law" in the absence

of a limitations period set forth in the federal statute. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 152 (1983). Consequently, although federal courts treat accrual as part of the nature of the action defined by federal law *applied consistently whenever and wherever that same claim is brought*, they regularly defer to the state's judgment about how long a party has to assert that claim. *See, e.g., Rawlings*, 312 U.S. at 97-98 ("The state statute of limitations is applicable," however, "[t]he question as to the time when there was a complete and present cause of action" for determining when the cause of action accrued under the limitations period "is a federal question . . . ."); *Daill v. Sheet Metal Workers' Local 73 Pension Fund*, 100 F.3d 62, 65 (7th Cir. 996) ("Even when relying on an analogous state statute of limitations, as in this case, we look to federal common law for purposes of determining the accrual date of a cause of action under a federal statute such as ERISA.").

In the ERISA context, federal courts have *uniformly* held that an ERISA cause of action does not accrue until the plan administrator denies or repudiates the claim. *See, e.g., Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir. 1989); *Hall v. Nat'l Gypsum Co.*, 105 F.3d 225, 230 (5th Cir. 1997); *Daill*, 100 F.3d at 66-67; *Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444, 451 (6th Cir. 1992); *Martin v. Constr. Laborers Pension Trust Fund for S. Cal.*, 947 F.2d 1381, 1386 (9th Cir. 1991); *Mason v. Aetna Life Ins. Co.*, 901 F.2d 662, 664 (8th Cir. 1990). Indeed, as numerous courts have recognized, any other rule would frustrate the requirement that plan participants must exhaust administrative remedies,

and needlessly put parties on "constant[] alert" for anything "that might give rise to a claim and start the statute of limitations running." *Rodriguez*, 872 F.2d at 72 (citation omitted). Moreover, Congress did not indicate in ERISA that courts should adopt the "odd result" of having "one time for the purpose of calculating when the statute of limitations begins to run," yet "another time for the purpose of bringing suit." *Reiter*, 507 U.S. at 267. Nothing in ERISA, therefore, authorized Sun Life to deviate from the standard federal accrual rule for statute of limitations purposes.

Consistent with these principles, although federal courts generally allow contracting parties to dictate the *length* of a limitations period, *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586, 608 (1947), *every* Circuit Court to have expressly analyzed and considered the *accrual* issue has uniformly applied the federal accrual rule to ERISA claims, notwithstanding a policy provision that could be construed as triggering a different accrual time. *See Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 520 (3d Cir. 2007) ("the accrual date for federal claims is governed by federal law, irrespective of the source of the limitations period"); *White v. Sun Life Assurance Co.*, 488 F.3d 240, 245 (4th Cir. 2007) (federal courts "treat the time at which the statute begins to run as governed by a uniform federal rule"); *Price*, 2 F.3d at 988 ("Because the cause of action is federal, . . . federal law determines the time at which the cause of action accrues," and "that time is when the plaintiff knows or has reason to know of the

injury that is the basis of the action.") (citation omitted).[1]

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[1] With one exception, every district court to have considered the issue has likewise reached the same conclusion. *See, e.g., Massengill v. Shenandoah Life Ins. Co.*, 459 F. Supp. 2d 656, 661-62 (W.D. Tenn. 2006) (applying federal accrual rule over the policy because "the crux of the matter in this case appears to be when the Plaintiff's cause of action actually *accrued*"); *Smith v. First UNUM Life Ins.* Co., No. 98-CV-2415, 1999 WL 369958, at *2 (E.D.N.Y. June 2, 1999) ("This [federal] accrual standard applies even where, as here, the policy at issue has prescribed a different accrual date, such as when 'the proof of loss was required to be furnished.'") (citation omitted); *Manginaro v. Welfare Fund of Local 771*, 21 F. Supp. 2d 284, 294 (S.D.N.Y. 1998) ("This rule of accrual applies even where, as here, the Plan prescribes a different accrual date."); *Mitchell v. Shearson Lehman Bros., Inc.*, No. 97 CIV. 0526, 1997 WL 277381, at *1-5 (S.D.N.Y. May 27, 1997) (rejecting argument that accrual "is properly measured from the date prescribed in the plan," rather than final denial per federal law because "it is simply illogical to say that a claim has accrued [for statute of limitations purposes] if it is automatically subject to dismissal when filed"); *Lowry v. Aetna Life Ins. Co.*, No. 96 Civ. 0856, 1996 WL 529211, at *4 (S.D.N.Y. Sept. 18, 1996) ("regardless of any date provided in the plan, the accrual date for claims under [ERISA] is governed by federal law"); *Patterson-Priori v. UNUM Life Ins. Co. of Am.*, 846 F. Supp. 1102, 1106 (E.D.N.Y. 1994) ("Uniformly, courts recognize that an ERISA cause of action accrues when an application for benefits is denied.") (citation omitted); *de Coninck v. Provident Life & Accident Ins. Co.*, 747 F. Supp. 627, 633 (D. Kan. 1990) ("To the extent that *this starting point* for the limitations period [set forth in the policy] differs from that which is extended to claimants under [federal law], the limitations period defined by Congress in ERISA must control."); *Salcedo v. John Hancock Mut. Life Ins. Co.*, 38 F. Supp. 2d 37, 43 (D. Mass. 1998) (rejecting applying policy accrual period tied to proof of loss because "the limitations period on a claim for benefits under ERISA should be measured from the date on which a participant's internal remedies are exhausted, that is, the date on which the appeal prescribed by ERISA is denied"); *see also id.* at 45 ("No suit for benefits can be

B. Sun Life's Purported "Conflicting" Decisions Do Not Even Address the Accrual Issue Resolved by the Fourth Circuit

Although Sun Life contends (at 11) that the Fourth Circuit deviated from decisions in the "Fifth, Sixth, Seventh, Eighth, and Tenth Circuits," none of those decisions even *considered* whether parties may, through a private contract, require federal courts in an ERISA action to deviate from federal law on accrual. Instead, these cases merely *used* the contractually set limitations period without discussing the accrual issue presented in this case. As the Fourth Circuit explained, Sun Life's cases "focus[ed]" on "limitations periods, not accrual dates" and thus did "not bear directly upon this case." (Pet. App. 20 & n.3.) The district court likewise correctly observed that "[i]n each of [Sun Life's] cases, the issue of whether the parties may contractually set an accrual date other than the date benefits were formally denied was *not* before the court." (Pet. App. 53) (citing *Clark v. NBD Bank*, 3 Fed. Appx. 500 (6th Cir. 2001); *Moore v. Berg Enters., Inc.*, 201 F.3d 448 (table), 1999 WL 1063823 (10th Cir. 1999); *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869 (7th Cir. 1997); *McDuffie v. Flowers Hosp., Inc.*, No. Civ.A.2:99-0876, 2001 WL 102398 (S.D. Ala. Jan.

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maintained as of the date that proof of loss must be submitted because no denial has yet occurred. Accordingly, it seems clear that this is not an appropriate accrual date."). Moreover, the exception proves the rule because it (incorrectly) found ERISA's exhaustion "discretionary" so as to avoid the problem of triggering the statute of limitations before suit could be brought. *See Ingram v. Travelers Ins. Co.*, 897 F. Supp. 1160, 1166 (N.D. Ind. 1995), *aff'd*, 78 F.3d 586 (7th Cir. 1996).

23, 2001), *aff'd*, 33 Fed. Appx. 991 (11th Cir. 2002)) (emphasis added). Other lower courts that have actually analyzed whether to apply the federal accrual rule in ERISA actions have likewise noted the irrelevance of the cases cited by Sun Life. *See, e.g., Salcedo v. John Hancock Mut. Life Ins. Co.*, 38 F. Supp. 2d 37, 44 (D. Mass. 1998) (noting the irrelevance of such cases because they "adopted the policy-dictated accrual date without question or explanation . . . ."). Simply put, lower courts do not view the cases cited by Sun Life as "conflicting" authority.

Sun Life's leading case – *Harris Methodist Fort Worth v. Sales Support Servs. Inc. Employee Health Care Plan*, 426 F.3d 330 (5th Cir. 2005) – nicely illustrates how far Sun Life has had to stretch to find a "conflict." In *Harris*, the benefit plan required actions to be filed within "three (3) years from the time written proof of loss is required to be given," and specified that such proof of loss must be provided "within ninety days after the date of such loss." 426 F.3d at 337-38. In connection with a mother's lengthy hospital stay for her twins' birth, the parties disagreed over whether each day's hospital expenses constituted a "loss." *Id.* at 338-39. Thus, as the Fifth Circuit emphasized, *"[t]he dispute" in that case was "over how to determine what constitutes a 'loss' under the Plan."* *Id.* at 338 (emphasis added). No party raised – and the court did not consider – the issue presented here concerning whether a contractual accrual date trumps the federal rule in the ERISA context.

Similarly, in *Doe*, 112 F.3d at 873-75, the Seventh Circuit focused on limitations periods, not the accrual issue raised in this case.

Notwithstanding some passing comments, no party raised or briefed whether the *federal accrual rule* should apply to the *length* of a policy's limitations period. Thus, as Judge Wilkinson explained about the Seventh Circuit case, "the focus of the opinion was on a plan's freedom to set limitations periods, not accrual dates." The Third Circuit likewise criticized the defendant's "reliance on *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 873-75 (7th Cir. 1997)" in that case as "misplaced" because "here, we must determine the proper accrual date." *Miller*, 475 F.3d at 520.

Sun Life did not even bother citing the Eighth Circuit case, *Blaske v. UNUM Life Insurance Co.*, 131 F.3d 763 (8th Cir. 1997), below, and it is easy to see why. In *Blaske*, the Eighth Circuit merely observed that (1) "ERISA contemplates reference to the most analogous state-law statute of limitations," (2) "Minnesota has a three year statute," and (3) the claim was untimely under the statute as well as a policy limitations period "*more liberal than the Minnesota Statute.*" 131 F.3d at 764 (emphasis added). Although the Eighth Circuit noted that "the District Court found the limitations period in the policy to be reasonable," the Eighth Circuit said *nothing* in *Blaske* about the distinction between accrual and length, nor did it have any reason to address the issue given that the claim was untimely under both the statute and the "more liberal" policy provision.

As for the unpublished decisions from the Sixth and Tenth Circuits, it almost goes without saying that these courts did not intend for these unpublished decisions to create or clarify any new points of law, let alone create a circuit split. *See*

Sixth Cir. R. 28(g) (2001) ("Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case."); Tenth Cir. R. 36.3(A) (1999) ("Unpublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel."). And, they did not. Instead, in the unpublished Sixth Circuit case, the court noted in passing that *shorter* contractual limitations periods are generally enforceable in ERISA policies – a proposition not at issue in this case – and proceeded to consider a distinctly different issue: whether "equitable tolling should apply" given the specific facts of that case. *See NBD Bank*, 3 Fed. Appx. at 503-04 (holding that "the district court was not in error in concluding that equitable tolling should not apply"). Thus, as another district court in the Sixth Circuit observed when actually confronted with the accrual issue, "*Clark v. NBD Bank*, 3 Fed. Appx. 500, 503-04 (6th Cir. 2001) . . . is unpersuasive, as it does not specifically address the issue of accrual . . . ." *Massengill v. Shenandoah Life Ins. Co.*, 459 F. Supp. 2d 656, 661 (W.D. Tenn. 2006) (explaining that "the crux of the matter in this case appears to be when the Plaintiff's cause of action actually *accrued*," which is a matter of federal law, not the policy).

Similarly, in the unpublished Tenth Circuit case, the accrual issue presented in this case simply was not raised. *See Moore*, 201 F.3d 448 (Table), 1999 WL 1063823. Instead, the plaintiff in that case seems to have focused on tolling and whether "it would be inequitable to apply the Plan's internal

limitations period since he was not provided a copy of the Plan after he requested one in 1990." *Id.* at *2 nn.5 & 6. Simply put, these cases again merely applied a policy's limitations period without any analysis, discussion, or consideration of whether the *federal accrual rule* or a seemingly contradictory policy accrual date should apply to start the policy's limitations period.

C. Sun Life's Contention That the Third, Fourth, and Ninth Circuit Decisions Are "Inconsistent With One Another" Is Misleading and Provides No Reason to Grant the Petition

Sun Life asserts that the "Third, Fourth, and Ninth Circuit" decisions "are also inconsistent with one another" and have "created even more inconsistency by adopting varying 'default' accrual rules." (Pet. 16-17.) In fact, however, these cases *consistently* apply "the standard rule that the limitations period commences when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry*, 552 U.S. at 201 (quoting *Rawlings*, 312 U.S. at 98). The so-called "inconsistency" to which Sun Life refers concerns the separate question of *when* an ERISA claimant may first file suit. Precisely because these cases *uniformly* apply the standard rule linking the accrual of the limitations period to when the plaintiff may first file suit, if and when this Court ever addresses the *separate* question of when the plaintiff may first file suit under ERISA – a question *not* presented in this case – the minor differences Sun Life points to will disappear.

II. The Fourth Circuit Decision Is in Harmony with Supreme Court Precedent, Including *Order of United Commercial Travelers v. Wolfe*

The Fourth Circuit decision also *follows* Supreme Court precedent. As discussed *supra* § I(A), the Supreme Court has made clear that although the *length* of a statute of limitations period may vary for a given federal cause of action, federal courts should apply *consistent* accrual rules to federal causes of action. *See, e.g., Rawlings*, 312 U.S. at 98 (accrual of statute of limitations begins when there is a complete and present cause of action, which "is a federal question" turning on "the applicable federal legislation"); *Reiter*, 507 U.S. at 267 (absent an "indication in the statute," the Court "will not infer such an odd result" of a federal cause of action accruing "at one time for the purpose of calculating when the statute of limitations begins to run, but at another for the purpose of bringing suit"); *Bay Area Laundry*, 522 U.S. at 201 ("Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief."); *Rotella*, 528 U.S. at 555 ("Federal courts, to be sure, generally apply a discovery accrual rule when a statute is silent on the issue.").

Rather than mention these more recent cases, Sun Life contends that the Fourth Circuit's opinion conflicts with *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586, 608 (1947), a pre-ERISA decision. In *Wolfe*, however, the Court did not face the accrual issue presented here because the contractual accrual period in that case *followed the federal accrual rule*, running from "the date the claim

for said benefits is disallowed." 331 U.S. at 599. The Court then expressly focused on the *length* of the limitations period, not accrual, when noting that parties may *shorten* "*the time* for bringing an action on such contract *to a period less than that prescribed in the general statute of limitations.*" *Id.* at 608 (emphasis added). *Wolfe* also did not involve a federal cause of action, let alone an ERISA claim, and thus nothing in that case can be read as giving private parties the power to require federal courts to apply different accrual rules in ERISA cases. Judge Wilkinson thus correctly recognized that *Wolfe* did not require the Fourth Circuit to adopt Sun Life's unusual accrual theory. (*See* Pet. App. 12.) ("The Supreme Court did not discuss or have before it in *Wolfe* a provision such as Sun Life's that set potential plaintiffs' limitations periods running before they could even file suit.").

III. The Fourth Circuit Correctly Adopted the Standard Federal Accrual Rule for ERISA Cases

The consistent and overwhelming rejection of Sun Life's position by every Circuit Court to have considered the issue comes as no surprise. Indeed, not only has Congress *never* even hinted that ERISA should follow an accrual rule that "is inconsistent with basic limitations principles," *Bay Area Laundry*, 522 U.S. at 200, everything about ERISA points in favor of applying the uniform federal rule. (Pet. App. 13-20.)

A. The Reasons for Applying Uniform Accrual Rules to Federal Causes of Action Apply with Particular Force to ERISA Claims

"Congress enacted ERISA to 'protect . . . the interests of participants in employee benefit plans and their beneficiaries' by setting out substantive regulatory requirements for employee benefit plans and to 'provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts.'" *Aetna Health*, 542 U.S. at 208 (quoting 29 U.S.C. § 1001(b)). Moreover, it specifically intended ERISA "to provide a uniform regulatory regime over employee benefit plans." As part of this uniform regulatory regime, federal courts (including the Fourth Circuit) have universally found an exhaustion requirement under ERISA pursuant to which "[a]n ERISA welfare benefit plan participant must both pursue and exhaust plan remedies before gaining access to the federal courts." *Gayle v. United Parcel Serv., Inc.*, 401 F.3d 222, 226 (4th Cir. 2005). As Judge Wilkinson emphasized, tying the accrual of the statute of limitations to the exhaustion of the internal appeals process, the federal accrual rule encourages use of the internal appeal process and "ready access to the Federal courts," *Aetna Health*, 542 U.S. at 208. (*See* Pet. App. 13-15.)

Sun Life has never taken issue with ERISA's exhaustion requirement. It nevertheless insists that the statute of limitations should begin running *before* completion of this exhaustion requirement, *i.e.*, before a plaintiff may file suit. As a consequence, this puts Sun Life's proposed rule in direct tension not only with Congress' intended uniform regulatory scheme, but with ERISA's "twin remedies of

administrative and judicial review" that form "part[] of [this] single scheme." (Pet. App. 14.) Moreover, Sun Life's rule creates the potential for the limitations period to expire *before* a cause of action may be asserted, and thus creates incentives for insurers to "simply bury a denial of coverage and wait for the statute of limitations to run." *Price*, 2 F.3d at 988. There can be no serious debate that Congress did not intend such an absurd result. *Cf. Aetna Health*, 542 U.S. at 217 (explaining that "our understanding" of ERISA provisions "must be informed by the legislative intent").

Although Sun Life claims (at 23) that the Fourth Circuit improperly concerned itself with "hypothetical facts," it cannot dispute that adopting its proposed rule would create perverse incentives for insurers to engage in gamesmanship at the expense of insureds in all *future* cases, and that lay persons do not expect the clock to begin running on the statute of limitations before they receive a final decision on their claim. Sun Life also cannot dispute that this potential for abuse is real. As the Fourth Circuit explained, "the time limits prescribed in the regulations are themselves somewhat elastic and do not apply to all of the time that would be counted against a claimant." (Pet. App. 23.) Thus, "a plan's decision-making can eat up the entire limitations period" before a claimant can bring suit – an outright unreasonable result. (*Id.*)[2]

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[2] As one district court noted in connection with rejecting the position Sun Life urges here, "[i]f the Defendant's calculation of the limitations period is correct, [Plaintiff] would have had five days in which to initiate a lawsuit." *Massengill*, 459 F. Supp. 2d at 662.

B. Sun Life's Contention That the Fourth Circuit Decision Creates an "Intolerable Burden" for ERISA Plan Administrators Finds No Support in the Record and Defies Common Sense

Wishing it were true, Sun Life says three times that "[t]he Fourth Circuit decision is incorrect and creates an intolerable burden for ERISA plans and their administrators and fiduciaries." (*See* Pet. 20, 21, 22.) The Fourth Circuit, however, faithfully followed federal law by applying "basic limitations principles," *Bay Area Laundry*, 522 U.S. at 200, and there is nothing in the record to suggest that plan administrators in the Ninth Circuit have had any difficulty whatsoever with limitations periods *uniformly* "begin[ning] to run at the moment when the plaintiff may seek judicial review." (Pet. App. 11.) To the contrary, treating "the time at which the statute begins to run as governed by a uniform federal rule," brings clarity and consistency to the process, and eliminates the burdens caused by an unpredictable rule that undermines judicial uniformity and predictability. (Pet. App. 10.)

Sun Life has never adequately addressed the problems that adopting an accrual rule flatly "inconsistent with basic limitations principles" would cause in the ERISA context. *Bay Area Laundry*, 522 U.S. at 200. Instead, it attempts to downplay the significance of its proposed rule's unpredictability by arguing (at 19-20) that the fact-specific, case-by-case analysis its standardless rule would require is no different than what occurs in cases of "tolling and estoppel." However, "[f]ederal courts have typically extended equitable relief [such as tolling] only

sparingly." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (explaining the limited nature of equitable tolling). In sharp contrast, Sun Life's rule would add unpredictability to virtually *every* case. Additionally, the rule would introduce *new* and problematic incentives for plan administrators and participants to act in ways contrary to ERISA's remedial scheme.

Sun Life's three reasons for its "intolerable burden" argument likewise do not withstand scrutiny. First, Sun Life states (at 20) that "ERISA plan terms are paramount" while criticizing the Fourth Circuit for purportedly relying upon "vague policy principles." As an initial matter, Sun Life's criticism reveals one of the problems the Fourth Circuit identified with Sun Life's proposal: Sun Life's "reasonableness" standard is "nowhere contained in its written plan," and thus fails to comport with ERISA's written plan requirement. (Pet. App. 18.) Moreover, even Sun Life recognizes that courts should *not* enforce contractual limitations periods if either (1) controlling law prohibits the modification, or (2) the contractual provision is unreasonable. On the first point, as detailed above, controlling law *does* prohibit the modification because Congress did not authorize the "odd result" Sun Life seeks to import into ERISA.

On the second point, the *length* of a period is not the only way a limitations period may become unreasonable. Sun Life's accrual theory is patently "unreasonable" because it would start the clock ticking before a claimant may file suit, and thus (1) compress the limitations period in *every case* to unpredictable and varying lengths nowhere specified in the Policy, (2) create perverse incentives for delay

by plan administrators, and (3) mire the courts in repeated oversight and case-by-case inquiries into whether the time afforded by the *inevitably compressed* limitations period was reasonable. (*See* Pet. App. 16-18.)

Second, Sun Life asserts (at 21) that the Fourth Circuit's decision "opens up all plan terms to possible prohibition on the ground that they are in 'tension' with general policies of ERISA." As a threshold matter, federal courts, including this Court, routinely do and should rely upon ERISA's underlying and important policies in resolving cases. *See, e.g., Aetna Health*, 542 U.S. at 217 (explaining that "our understanding" of ERISA provisions "must be informed by the legislative intent"). More fundamentally, Sun Life's speculation that the Fourth Circuit's invocation of relevant policy considerations in this case will undermine contractual terms in other cases ignores that the Ninth Circuit resolved the accrual issue some fourteen years ago. *See Price*, 2 F.3d at 988. In doing so, it likewise invoked policy considerations as *one of the bases* for its decision, yet not a single court has *ever* relied on *Price* to "prohibit[]" different plan terms.

Third, Sun Life argues (at 22) that the Fourth Circuit decision creates "patent inconsistency in the enforcement of ERISA plan limitations periods" because a limitations period of twenty-eight months would probably be considered reasonable. Here too, Sun Life blurs the accrual/length distinction. While a true twenty-eight month limitations period that began running when the underlying claim was finally denied may not be unreasonable (depending on the circumstances), the *length* of the limitations

period is not what makes Sun Life's proposal unreasonable. Triggering the limitations period before a claimant may file suit so that the length of the period inevitably varies case to case makes it unreasonable. Significantly, applying a consistent accrual rule will bring consistency to the enforcement of plan limitations periods, both in terms of accrual *and* length.

IV. This Case Does Not Provide an "Ideal Vehicle" for Resolving the Non-Existent Circuit Split

Rather than presenting an issue "ripe" for review, Sun Life urges a problematic theory that no Court of Appeals has yet to adopt. Moreover, for the reasons explained above, it is unlikely that any Court of Appeals would ever adopt Sun Life's view after due consideration and analysis. However, to the extent that a circuit split warranting this Court's review may ever occur, the recent circuit decisions on the issue show that parties are now litigating the accrual issue in the lower courts. Prudence, therefore, dictates waiting for an *actual* circuit split. This case also does *not* provide a good vehicle for resolving the (nonexistent) circuit split because other reasons show the Fourth Circuit reached the correct result, and Sun Life's claim about the broader impact of this case is misleading.

A. Sun Life's Position Rests on a Misconstruction of the Policy

Federal accrual issues aside, Sun Life rests its entire case on North Carolina's required policy provision stating that no legal "action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished."

(Pet. 5 (quoting N.C. Gen. Stat. § 58-51-15(a)(11)).) North Carolina law, however, further requires insurers to adopt and incorporate a policy provision *delaying* the "required" proof of loss deadline *in cases involving a policy that provides periodic payments for continuing loss (i.e., a disability policy that pays a benefit for each month of disability)*:

> PROOFS OF LOSS: Written proof of loss must be furnished to the insurer at its said office ***in the case of a claim for loss for which this policy provides any periodic payment contingent upon continuing loss within [90] days after the termination of the period for which the insurer is liable*** . . . .

N.C. Gen. Stat. § 58-51-15(a)(7) (emphasis added); (Pet. App. 85.)[3] The "majority of courts," including both the Third and Eighth Circuits, "have interpreted the language 'period for which we are liable' as requiring proof of loss to be furnished after the end of the entire period of continuous disability." *Knoepfler v. Guardian Life Ins. Co. of Am.*, 438 F.3d 287, 290 (3d Cir. 2006) (citations omitted); *see also Weyrauch v. Cigna Life Ins. Co. of N.Y.*, 416 F.3d 717, 721 (8th Cir. 2005) ("The net effect of these provisions is that an action must be filed within three years and 90 days of the date the insured ceases to be totally disabled."). Because the Policy provided for periodic disability payments to Ms. White (notwithstanding Sun Life's improper denial of

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[3] The statute previously provided for 90 days, but was amended to change the period to 180 days effective July 1, 2001, for claims received on or after that date.

her claim), the Policy's accrual date did not begin to run until the end of the *entire* period for which the Policy provided benefits.[4]

Sun Life, however, omitted this required provision from Ms. White's Policy, yet could not have lawfully done so because this provision *applies* to disability policies. *See* N.C. Gen. Stat. § 58-51-15(c) (only if a required provision is "inapplicable to or inconsistent with the coverage provided by a particular form of policy" may the term be changed, and then only "with the approval of the Commissioner"); *see also* N.C. Gen. Stat. § 58-3-35(b) (no insurer shall limit the time within which any action on the insurance contract may be commenced "to less than the period prescribed by law"); N.C. Gen. Stat. § 58-3-35(c) ("All conditions and stipulations forbidden by this section are void."). Sun Life's assertion (at 24) that this case provides a good vehicle for review because "there are no debates about proper interpretation" of the Policy is simply false. Sun Life's entire position rests on its misinterpretation of North Carolina's mandatory policy provisions stating when proof of loss must be filed.

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[4] The dissent concluded that this mandatory provision applies only if the insurer initially accepts the claim and later terminates benefits, *i.e.*, when the insurer does not breach the policy from the outset. The provision, however, expressly states that it applies to all claims where the "*policy* provides any periodic payment contingent upon continuing loss." N.C. Gen. Stat. § 58-51-15(a)(7) (emphasis added); *see also Knoepfler*, 438 F.3d at 291 (applying similar provision in a case involving, as here, an initial denial of benefits).

B. State Statutes Provide No Reason to Grant the Petition

Sun Life's argument that this case involves "virtually universal" policy language mandated by various states likewise glosses over that the Policy in this case did not even include the key proof of loss provisions mandated by North Carolina. More fundamentally, the so-called universal policy provision comes from a National Association of Insurance Commissioners guideline that states like North Carolina began adopting in the early 1950s – well before ERISA even existed. Tellingly, no court that has actually considered the issue has held that any state's statutorily mandated policy accrual provision takes precedence over federal law in the ERISA context. In fact, some states exempt the group insurance policies that ERISA governs from such provisions,[5] while others use tolling principles to, in effect, begin the statute of limitations running after the plan administrator makes the final denial.[6] Existing case law further shows that policies in various states are not as consistent as Sun Life suggests. *See, e.g., Knoepfler,* 438 F.3d at 288 (noting that the policy varied from provisions mandated

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[5] *See, e.g., Furleigh v. Allied Group Inc.*, 281 F. Supp. 2d 952, 966-67 (N.D. Iowa 2003) (noting that Iowa Code § 514A.3(1)(k) does not apply to group policies); *Salcedo*, 38 F. Supp. 2d at 40 (noting that Mass. Gen. Laws Ch. 175 § 108 does not apply to group policies).

[6] *See, e.g., Rodolff v. Provident Life & Accident Ins. Co.*, No. 01-CV-0768, 2002 WL 32072401, at *4 (S.D. Cal. Apr. 5, 2002) (citing *Prudential-LMI Commercial Ins. v. Super. Ct.*, 798 P.2d 1230 (Cal. 1990)); *see also Walker v. Am. Bankers Ins. Group*, 836 P.2d 59, 62 (Nev. 1992); *Peloso v. Hartford Fire Ins. Co.*, 267 A.2d 498, 501 (N.J. 1970).

under New Jersey law and that the insurer had received proper approval for the change).

Sun Life also did not develop this multi-state argument below, thereby depriving Ms. White of the opportunity to conduct discovery and develop the record concerning whether ERISA plan administrators in other states (let alone in North Carolina) *actually* interpret or administer ERISA plans in the manner Sun Life has suggested. Indeed, administrators within the Third, Ninth, and now Fourth Circuits – along with states covered by the various district courts to have addressed the issue – may *not* at this time interpret ERISA plans in the manner Sun Life has urged here.

Lastly, to the extent a state law really did try to dictate to the federal courts when a federal cause of action accrues, the Supremacy Clause and ERISA's primary objective of "a uniform regulatory regime," *Aetna Health*, 542 U.S. at 208, would render such a law impotent. As this Court has explained, "[u]nder ordinary principles of conflict pre-emption . . . even a state law that can arguably be characterized as 'regulating insurance' will be pre-empted if it . . . [conflicts with] ERISA's remedial scheme." *Id.* at 217-18 (scheme that "provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme" would be preempted). For all of these reasons, the "virtually universal" rule is the one the Fourth Circuit adopted. It is thus no wonder that when Sun Life first pitched its "forty-nine states" argument in the petition for rehearing *en banc*, "no member" of the Fourth Circuit even called for a vote. (Pet. App. 78.)

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition be denied.

RESPECTFULLY SUBMITTED this 12th day of October, 2007.

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